BANK ISLAM MALAYSIA BHD

v.

AININ ABDULLAH & ANOR

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[ORIGINATING SUMMON NO: 24-790-90]
25 NOVEMBER 1996

LAND LAW: *Charge - Order for sale - Application for sale made to court - Whether application for sale should have been made to Land Administrator - Whether such order for sale null and void - National Land Code 1965, ss. 256, 260*

LAND LAW: *Indefeasibility of title and interests - Insufficient instrument - Whether purchase acquired immediate indefeasibility - Status of bona fide purchase for value*

This was the defendants/chargors' application to set aside the order of sale, granted on 12 September 1994, and the judicial sale, realised on 30 November 1994, of the defendants' land ('the land').

On 1 November 1990 the plaintiff/chargee applied and on 12 September 1994 obtained an order for sale of the land to recover the sum of RM210,927.95 outstanding as at 12 September 1994. On 23 November 1994, the senior assistant registrar ('the SAR') settled the terms and conditions of sale. On both occasions, the orders were granted in the absence of the defendants or counsel. On 30 November 1994, the first intervener successfully purchased the land at the public auction. On 28 April 1995, the defendants filed the instant application. On 28 February 1996, the second intervener (the purchaser of the land from the first intervener) obtained leave to intervene in these proceedings. On 24 June 1996, the first intervener obtained leave to intervene in the same.

Counsel for the defendants submitted that the application for the order for sale should have been made to the land administrator under s. 260 of the National Land Code 1965 ('the NLC') and not to the court under s. 256 of the NLC. She asserted that s. 260(2) of the NLC provides that an application for an order for sale of land which is held under the Land Office title should be made to the land administrator. She contended therefore that the order for sale was null and void.

Counsel for the second intervener, relying on s. 340(3) of the NLC, contended that her client was a *bona fide* purchaser who had purchased the land from the first intervener. She also contended that the defendants did not give any explanation for the delay in the application and that serious prejudice would be caused to the second intervener. Counsel for the first intervener on the other hand contended that his client had acquired an immediate indefeasible title when he paid the full purchase price and obtained registration of his interest.

Held:

[1] Section 340 of the NLC provides that the circumstances in sub-s. (2) shall not affect the title or interest acquired by any purchaser in good faith and for valuable consideration or by any person or body claiming through or under such a purchaser. The title and interest of 'a purchaser in good faith and for valuable consideration' or 'any person or body claiming through or under such a purchaser' is altogether protected by the NLC.

[2] Since the court had no jurisdiction to grant the order for sale under s. 256 of the NLC, the first intervener had therefore obtained title through an insufficient or void instrument which could not have and should not have passed title – which was therefore defeasible at the suit of the defendants, the former registered proprietors – until a *bona fide* third party was registered.

[2a] The title of the first intervener therefore was not indefeasible at the suit of the defendants until a *bona fide* third party was registered. However, the first intervener became a constructive trustee for the second intervener when he had done all that was necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the second intervener and by giving possession of the premises to the second intervener.

[3] The prejudice caused to the defendants by the order for sale under s. 256 and not s. 260 of the NLC was academic rather than real. On the other hand, the prejudice to the second intervener, if the order for sale was set aside, would be real and substantial. *Albeit* with a right to an action *in personam* against the first intervener, the second intervener would be unjustly penalised, for he would be ejected from the premises he had already renovated and expended a considerable sum. The second intervener, who was not at all at fault, would be ejected as well from his home – and that would not have been right.

[3a] To treat the register as everything would not be just. It was far more equitable that the defendants, who sat on their rights but yet would have or ought reasonably to have known or contemplated that an auction sale could be the precursor of further dealings in which other third parties could also acquire interest, should not be allowed to exploit their own paralysis and indolence at the expense of the second intervener.

[Defendants' application dismissed.]

Cases referred to:
Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1995] 4 CLJ 45 ***(refd)***
CI Holdings Bhd v. Jabatan Pemegang Harta [1992] 1 CLJ 109 ***(refd)***
Frazer v. Walker [1967] 1 All ER 649 ***(refd)***
Gondola Motor Credit Sdn Bhd v. Almurisi Holdings Sdn Bhd [1992] 4 CLJ 2212 ***(refd)***
H Rubber Estates Bhd v. Director-General of Inland Revenue [1979] 1 MLJ 115 ***(refd)***
Land Executive Committee of Federal Territory v. Sykt Harper Gilfillan [1981] 1 MLJ 237 ***(refd)***
Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors [1982] 2 MLJ 53 ***(refd)***
Ong Chat Pang v. Valliappa Chettiar [1971] 1 MLJ 224 ***(foll)***
Ong Lian v. Tan Eng Jin [1917] 1 FMSLR 325 ***(refd)***
Tan Teng Pan v. Wong Fook Shang [1973] 1 MLJ 31 ***(refd)***
Tan Tock Kwee & Anor v. Tey Siew Cha & Anor [1995] 4 CLJ 658 ***(refd)***
Temenggong Securities Ltd v. Registrar of Titles, Johore [1974] 2 MLJ 45 ***(refd)***
United Asian Bank Bhd v. Elgi Marka Sdn Bhd [1995] 1 CLJ 407 ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 256, 260(2), 265(3), 340(2)(b), (3)

Other sources referred to:
Indefeasibility, Judith Sihombing, [1979] 1 MLJ lii, liv, lv
Interpretation of Statutes, Maxwell, 12th edn, p 28
Land Law in Malaysia – Cases and Commentary, Teo Keang Sood & Khaw Lake Tee, pp 149, 320
National Land Code – A Commentary, Judith Sihombing, 2nd edn, 794, 795
Sale and Purchase of Real Property in Malaysia, Visu Sinnadurai, p 301
Tenure and Land Dealings in the Malay States, David Wong, p 361

For the plaintiff - K Thavakumar; M/s Mohamed Ismail & Co
For the defendants - Faridah Ahmad; M/s Zulhaimi & Co
For the 1st intervener - Chuah Chong Ewe; M/s GB Neoh, Ng & Anuar
For the 2nd intervener - Fatimah Mohd Idris

[Editor's note: This judgment was received by the CLJ on 24 August 1998.]

Reported by Mariette Peters-Goh

JUDGMENT

Jeffrey Tan J:

This is the defendants/chargors' application (encl. 32 dated 28 April 1995) to set aside the order of realised on 30 November 1994, of the defendants' land held under Suratan Hakmilik Sementara No. H.S. (M) 306 P.T. 003491 Mukim 7, Daerah Seberang Perai, Utara, Pulau Pinang (hereinafter called the said land).

Stated briefly, on 1 November 1990, the plaintiff/chargee applied and on 12 September 1994 obtained an order for sale of the said land to recover the sum of RM210,927.95, it being the principal and interests outstanding as on 12 September 1994. On 23 November 1994, the learned Senior Assistant Registrar settled the terms and conditions of sale. On both occasions, the orders were granted in the absence of the defendants or counsel. On 30 November 1994, one Yeap Seong Hua (1st intervener) successfully purchased the said land at the public auction. As said, on 28 April 1995, the defendants filed the instant application. On 28 February 1996, one Chai Kon Lim (2nd intervener), the purchaser of the said land from the 1st intervener, obtained leave to intervene in these proceedings. On 24 June 1996, Yeap Seong Hua (1st intervener) obtained leave to intervene in these proceedings. (Note: None of the said orders was made by this court)

On the instant application, Miss Faridah for the defendants submitted that the application for order for sale should have been made to the land administrator under s. 260 of the National Land Code 1965 (Code) and not to the court under s. 256 of the Code. She asserted that sub-s. 260(2) provided that the application for an order for sale of the said land but held under Land Office title, as indeed was the case, by the plaintiff should be made to the land administrator. Extending the case of *United Asian Bank Bhd. v. Elgi Marka Sdn. Bhd.* [1995] 1 MLJ 301 (curiously, a judgment of the learned judge who granted the order for sale of the said land in the instant case) she contended that the order for sale was null and void.

Strangely, but surely there must have been good reason, Mr Thavakumar for the plaintiff did not oppose the defendant's application.

However, Miss Fatimah for the 2nd intervener was not giving in without a fight. She contended that the 2nd intervener was a *bona fide* purchaser who purchased the said land on 17 March 1995 from the 1st intervener for RM180,000. Since then, she said, the 2nd intervener had renovated and occupied the premises on the said land. She asserted that sub-s. 340(3) provides that any title or interest acquired by a purchaser in good faith and for valuable consideration shall not be affected by any of the circumstances specified in

sub-s. 340(2) of the same said Code. Finally, she contended that the defendants did not give any explanation for the delay in the application and that serious prejudice would be caused, whereas there would be none if the application is refused, to the 2nd intervener.

Not surprisingly, Mr Chuah for the 1st intervener fully supported Miss Fatimah. Extending the case of *Boonsom Boonyanit @ Sun Kok Eng v. Adorna Properties Sdn. Bhd.* [1995] 2 MLJ 863, he contended that the 1st intervener acquired an immediate indefeasible title when he paid the full purchase price and obtained registration of his interest. The 1st intervener sold his interest to the 2nd intervener by private treaty. He submitted that the circumstances specified in sub-s. 340(2) did not apply. Lastly, he contended that the interveners were "innocent victims" whilst the defendants were slow in making the instant application.

In her short reply, Miss Faridah referred to sub-s. 265(3) which provides that the court may substitute for the order for sale of the land administrator under s. 256 and make such other order as it may think just.

It is convenient to begin with the authority cited by learned counsel. With regard to ss. 256 and 260, in *United Asian Bank Bhd. v. Elgi Marka Sdn. Bhd. (supra)*, the court held that applications for an order for sale of land held under a land office title shall be made only to the land administrator and that an order for sale of such land made pursuant to s. 256 is a nullity and devoid of all effect. In coming to that conclusion, the learned judge acknowledged he was guided by the following dicta of Raja Azlan Shah LP (as HRH then was) in *Land Executive Committee of Federal Territory v. Sykt Harper Gilfillan* [1981] 1 MLJ 237:

> As a general rule where a statute creates a new obligation and provides a special mode of enforcing it, no other court has jurisdiction to enforce that obligation.

At any rate, the direct authority that the learned judge relied on was *Tan Teng Pan v. Wong Fook Shang* [1973] 1 MLJ 31, where Yong J held that the court, in view of the provisions of s. 260, had no jurisdiction to entertain an application by a chargee for an order for sale of land held under a land office title. Indeed, *Tan Teng Pan* was also followed in *C.I. Holdings Bhd. v. Jabatan Pemegang Harta* [1992] 1 CLJ 109 @ 115, where Dr Zakaria Yatim J (as he then was) similarly held that the court had no jurisdiction to entertain an application for an order for sale of land held under a land office title.

Unquestionably, just as Miss Faridah contended, the court had no jurisdiction to entertain the plaintiff's application for an order for sale. But yet, must it follow, *ipso facto,* that the order for sale and auction sale be set aside, the corollary being the setting aside of all dealings pursuant to and following the order for sale, regardless of the title and interest of the interveners?

Perhaps, the "facts" ought to be settled. That the 1st intervener was the successful purchaser at the auction sale of the said land on 30 November 1994 is not a disputed fact. That the 1st intervener sold the said land to the 2nd intervener on 15 March 1995 is also not a disputed fact. That the certificate of sale by the court was issued on 18 July 1995, that the 1st intervener was registered as proprietor of the said land on 6 September 1995 (see encl. 49 exh. "YSH-1"), that the relevant sale and purchase agreement between the 1st intervener and 2nd intervener was stamped on 20 March 1995 (see encl. 44 exh. "CKL-1") and that the defendants' private caveat was lodged at 10.40am on 23 September 1995 (see encl. 49 exh. "YSH-1") are facts easily elicited from the exhibits and from the court file.

Then, undeniably, the defendants only applied (on 28 April 1995) to set aside the order for sale and auction sale and lodged their private caveat (on 23 September 1995) against further dealings after the 2nd intervener had acquired a registrable interest (on 15 March 1995).

Section 340 of the Code provides as follows:

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
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> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
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> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s. (2) -
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> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) ...

Reading the section as a whole, s. 340 clearly provides, in plain and unambiguous language, and "the safer and more correct course of dealing with the question of construction is to take the words themselves and arrive if possible at the meaning without in the first instance reference to cases" (H *Rubber Estates Bhd. v. Director-General of Inland Revenue* [1979] 1 MLJ 115 per Gill CJ, citing Maxwell on Interpretation of Statutes 12th edn @ 28), that the title of a registered proprietor, save for the circumstances in sub-s. (2), shall be indefeasible. It translates that a registered proprietor who acquired title by registration of a instrument tainted by any of the circumstances specified in sub-s. (2) does not acquire an indefeasible title. And that defeasible title and any interest subsequently granted thereout shall be liable to be set aside. However, s. 340 also provides, in equally plain and unambiguous language, that the circumstances in sub-s. (2) shall not affect the title or interest acquired by any purchaser in good faith and for valuable consideration or by any person or body claiming through or under such a purchaser. Evidently, the title and interest of "a purchaser in good faith and for valuable consideration" or "any person or body claiming through or under such a purchaser" is altogether protected by the Code.

It stacks up that the defeasible title or interest of any person or body for the time being registered as proprietor of any land, upon acquisition by "a purchaser in good faith and for valuable consideration", would rise like a phoenix from the ashes. Accordingly, the title or interest of "a purchaser in good faith and for valuable consideration" or "any person or body claiming through or under such a purchaser", since it is not affected by the specified circumstances for defeasibility, shall be indefeasible. "In other words, a registered proprietor, the vendor, under a sale and purchase agreement, even though he himself does not possess an indefeasible title, may give an indefeasible title to a *bona fide* purchaser" (Sale and Purchase of Real Property in Malaysia by Visu Sinnadurai @ 301). "An insufficient or void instrument can act as a good title if the property is ultimately transferred to a *bona fide* purchaser for value" (*Tan Tock Kwee & Anor v. Tey Siew Cha & Anor* [1995] 4 CLJ 658 @ 667, per Haidar J (as he then was)). Even an extreme case, "a *bona fide* purchaser for value, taking from a proprietor who had come onto

the register by registration of a forged transfer, [acquires] an indefeasible title" (*Tenure and Land Dealings* in the Malay States by David Wong @ 361, paraphrasing *Ong Lian v. Tan Eng Jin* [1917] 1 FMSLR 325). But until transfer to a *bona fide* purchaser, the indefeasibility of a title acquired by the registration of a void or voidable instrument is deferred (*Mohammad bin Buyong v. Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53).

Judith Sihombing in her article *"Indefeasibility"* (1979) 1 MLJ lii @ liv, lv explained thus the principle of deferred indefeasibility:

> The principle of deferred indefeasibility means that on registration the title of the registered owner obtained without fraud, remains potentially open to attack, if certain circumstances exist, until the title is transferred to another. This means that if A, registered as owner but having a defeasible title because the transfer under which registration was obtained was void, transfers the property to B, a *bona fide* purchaser for value, then B on registration will obtain an indefeasible title, A not however having had an indefeasible title ... Deferred indefeasibility means in practice that an inherently adverse title does not become indefeasible until the title is transferred to a *bona fide* purchaser for value. But it must be stressed that unless an otherwise defeasible title is timeously and successfully challenged the registered owner is treated as having an indefeasible title and one which he can pass onto another. Even though the terms of the Code imply that on registration of, for example, a void instrument, title is immediately defeasible, in fact such title is indefeasible until successfully challenged.

In her authoritative work *National Land Code – A Commentary* 2nd edn @ 794, 795, Judith Sihombing phrased as follows the distinction between immediate and deferred indefeasibility:

> It is said there are two types of indefeasibility; immediate and deferred ... Where a party becomes registered as a proprietor despite using a void and voidable instrument (so that he is liable to be displaced only by other statutory exceptions to indefeasibility, such as fraud) then the register establishes his title without the need to treat the registration as merely the root of potential title. In other words, he has an immediately final and state guaranteed title for which the general validity of the instrument is immaterial. If a void or voidable instrument has been used it matters not as the act of registration has removed imperfections in that instrument: *Breskar v. Wall* [1971] 46 ALJR 68. In such schemes, the one usual exception to indefeasibility is the fraud of the registered proprietor or his agent.
>
> The deferred indefeasibility principle provides that: a prior registered estate or interest, for the removal of which from the register there is no authority but a forged or void instrument, is not destroyed unless afterwards a person who, according to the existing conditions of the register is entitled to do so, gives a registrable instrument which is taken *bona fide* for value and registered. (*Clements v. Ellis* 51 CLR 217 Dixon J at p. 237). Under deferred

> indefeasibility, the title of the registered proprietor who has taken under a forged or void instrument is defeasible at the suit of the former registered proprietor until a third party is registered.

However, it was underscored in both article and book that the Code provides for deferred indefeasibility although most other Torrens jurisdictions now follow immediate indefeasibility principles. Tracing the history of the Torrens system in Malaysia from the introduction of the Registration of Titles Regulations 1891 (Selangor) No IV of 1891 to the Land Code 1928 (Cap 138), the learned author concluded – "By 1928, indefeasibility in Peninsular Malaysia was deferred." (*National Land Code – A Commentary* 2nd edn @ 796) Teo Keang Sood and Khaw Lake Tee in *Land Law in Malaysia – Cases and Commentary* @ 149 remarked that the application of the doctrine of immediate indefeability is not consistent with the provisions of sub-s (2) of s. 340. David Wong in his work Tenure and Land Dealings in the Malay States @ 346 was more direct: "section 340 clearly admits of no room for argument in favour of immediate defeasibility." At p. 348, David Wong observed: "... many Torrens systems have gone the way of *Frazer v. Walker* [1967] 1 All ER 649 (meaning immediate indefeasibility), while the Malaysian Torrens system stays quite apart at the extreme end of the other direction." (Words in italics mine)

In *Mohammad bin Buyong v. Pemungut Hasil Tanah Gombak & Ors (supra),* Hashim Yeop A Sani J (as he then was) construed the effect of s. 340 as follows:

> the doctrine carried in s. 340 is the doctrine of indefeasibility. What that section protects is that the title or interest of any person for the time being registered as proprietor of any land shall be indefeasible. Sub-section (2) of the section provides for the exceptions in that the title or interest shall not be indefeasible in any case of fraud or misrepresentation or where registration was obtained by forgery or by means of an insufficient or void instrument or where the title or interest was unlawfully acquired. This provision deals with what is called deferred indefeasibility.

Given the weight of the authority, there is little doubt that s. 340 will not admit of any argument in favour of immediate indefeasibility. "In Malaysia ... under s. 340 ... deferred indefeasibility applies" (*Sale and Purchase of Real Property in Malaysia* by Visu Sinnadurai @ 301).

In *Tan Tock Kwee & Anor v. Tey Siew Cha & Anor (supra)* Haidar bin Mohd Noor J (as he then was) said:

a I am of the opinion that the words 'insufficient' or 'void' should be read disjunctively, that is, 'insufficient instrument' would be confined to failure to comply with the procedures or formalities laid down by the NLC whereas 'void instrument' would, *inter alia,* relate to any prohibition imposed by NLC or any written law.

b The title of the 1st intervener who had taken under an instrument which the court had no jurisdiction to grant under s. 256, an instrument be it insufficient or void but nonetheless an instrument that could not and should not pass title, is defeasible at the suit of the defendants, the former registered proprietors until a *bona fide* third party is registered.

c The 2nd intervener claims that he was that purchaser in good faith and for valuable consideration. Indeed, the date of the stamp on the sale and purchase agreement confirms that the private sale was reached even prior to the defendants' setting aside application. As the successful purchaser at the public auction, the 1st intervener was entitled to a certificate of sale. A certificate d of sale is an instrument of dealing and shall be registrable accordingly (*Gondola Motor Credit Sdn. Bhd. v. Almurisi Holdings Sdn. Bhd.* [1992] 2 MLJ 680). However, when the sale was entered into on 15 March 1995, the certificate of sale was yet not issued.

e Quite understandably, therefore, the sale and purchase agreement provided that the balance shall be paid after the issuance of the certificate of sale. Meanwhile, also as provided by the sale and purchase agreement, the 2nd intervener had taken immediate possession of the said land and proceeded to renovate the premises. Exhibited are photographs of the then ongoing renovation works and the receipts of the payments to the renovation contractor. f Apparently, the 2nd intervener expended RM68,680 towards the said renovation. Also exhibited is a memorandum of transfer, duly executed by the 1st intervener and 2nd intervener on 5 September 1995 and duly adjudicated and stamped on 5 December 1995, which was not registered, it could be reasonably assumed, because of the defendants' private caveat lodged at g 10.40am on 23 September 1995. "The point at which the (1st intervener) became constructively a trustee for the (2nd intervener) (had been reached) ... when he [did] all that was necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the (2nd intervener)" (*Ong Chat Pang v. Valliappa Chettiar* [1971] 1 MLJ 224 per Gill FJ (as he h then was) @ 229. All said, it could not be suspected that the private sale was invented to weather through the defendants' application or to breathe indefeasibility to the 1st intervener's defeasible title.

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In the event, the defendants did not dispute faith and for valuable consideration. The defendants merely argued that the court had no jurisdiction to grant the order for sale. Otherwise, the defendants did not give any explanation for their absence at the hearing of the application for the order for sale nor for their delay in making the instant application.

It should be said that the order for sale would not have been granted, in all likelihood, if the defendants had objected to the jurisdiction of the court at the hearing of the application for the order for sale. But yet, even then, it would still have been the same. The plaintiff would have had the order for sale, *albeit* from the land administrator who does not exercise any judicial or quasi powers but is bound by what appears on the register and is required unless he is satisfied that there has been no default of the payments provided for to grant the order for sale (see *Land Law in Malaysia* 2nd Edn by Teo Keang Sood & Khaw Lake Tee p. 320). In the final analysis, the prejudice occasioned to the defendants by the order for sale under s. 256 and not s. 260 is academic rather than real. On the other hand, the prejudice to the 2nd intervener, if the order for sale is set aside, would be real and substantial. *Albeit* with a right to an action *in personam* against the 1st intervener, the 2nd intervener would be unjustly penalised, for he would be ejected from the premises he had already renovated and expended a considerable sum. The 2nd intervener, who is not at all at fault, would be ejected as well from his home. And that would not be right.

As said, the title of the 1st intervener, because of the circumstance in s. 340(2)(b), "shall not be indefeasible" at the suit of the defendants, the former registered proprietors until a *bona fide* third party is registered. However, but as also said, the point at which the 1st intervener became constructively a trustee for the 2nd intervener had been reached when he did all that was necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the 2nd intervener and by giving possession of the premises to the 2nd intervener. The 1st intervener is a bare trustee who has "no interest in the (said) land which can be the subject matter of a caveat" (*Temenggong Securities Ltd v. Registrar of Titles, Johore* [1974] 2 MLJ 45). The 2nd intervener has the equitable estate and the caveatable interest whilst the 1st intervener has no real ownership in the said land other than in name.

Given the facts and circumstances of the case, to treat the register as everything would not be just. It is far more equitable that the defendants, who sat on their rights but yet would have or ought reasonably to have known or contemplated that auction sale could be the precursor of further dealings in which other third parties could also acquire interest, should not be allowed to exploit their own paralysis and indolence at the expense of the 2nd intervener.

For the reasons aforesaid, the defendants' application is dismissed with costs.